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No. 90-308

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN C. PRITCHARD, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether petitioner's petition for review of an order of the National Transportation Safety Board was filed within 60 days of the entry of that order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Statutes, regulations and rule:

Federal Aviation Act, 49 U.S.C. 1485(c)	7
49 U.S.C. App. 1486(a)	2, 3, 8
49 C.F.R.:	
Section 821.8(a)	6
Section 821.8(d)	6
Section 821.8(e)	7
Section 821.8(g)	7, 8
Section 821.8(h)	8
Section 821.30	2
Section 821.64	3, 6
Fed. R. App. P. 25(a)	4

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OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal (Pet. App. 15) is unreported. The decision of the National Transportation Safety Board (Pet. App. 17-22) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1990. The court denied petitioner's "motion for reconsideration" on June 27, 1990 (Pet. App. 16). The petition for a writ of certiorari was filed on August 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Aviation Administration issued an order providing for a 30-day suspension of petitioner's Airline Transport Pilot Certificate. The order was based on the FAA's finding that petitioner, after landing a commercial aircraft at Kansas City International Airport, acted carelessly in allowing the plane's right main landing gear to leave a taxiway, enter the mud, and strike a taxiway light. Pet. App. 23-24.[1] Petitioner appealed to the National Transportation Safety Board. After a hearing, the administrative law judge found that petitioner had violated FAA regulations, but reduced the suspension to 20 days. See Pet. App. 18. Upon review, the NTSB upheld the 20-day suspension. *Id.* at 17-22.[2]

Petitioner, proceeding *pro se*, filed a petition for review of the Board's order in the court of appeals. The court dismissed the petition for review, finding that it had not been filed within the period prescribed by 49 U.S.C. App. 1486(a) for a filing as of right and that petitioner had not shown good grounds justifying an extension of the statutory period. Pet. App.

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[1] Under applicable regulations, an FAA order of suspension is effective unless appealed to the NTSB. If an administrative appeal is taken, the order of suspension serves as the complaint in an administrative proceeding that includes a hearing before an administrative law judge, followed by an appeal to the NTSB. See 49 C.F.R. 821.30.

[2] Under the Aviation Safety Reporting Program, petitioner will not be required to serve this suspension. Under that program, a suspension is not served if the incident in question does not involve intentional misconduct and is promptly reported to NASA. The violation and penalty do, however, remain a matter of record.

15. Section 1486(a) provides that a petition for review as of right must be filed within 60 days of the entry of an NTSB order; the question presented by this case is when the NTSB's order was "entered" for purposes of this statute.[3]

1. Under the Board's rules, "[t]he date of entry of the Board Order is the date on which the order is served." 49 C.F.R. 821.64. The Board's order upholding petitioner's suspension was marked "SERVED: November 24, 1989" (Pet. App. 17). The Board's records reflect that, on that date, copies of the order were sent by certified mail to petitioner and, as the result of an oversight, to his *former* attorney. The order was mailed to petitioner at the address in New Braunfels, Texas, that his attorney had provided when initiating the appeal of the FAA's order of suspension. Exh. A.[4] The return receipt was returned to the NTSB—executed, on November 28, 1989, in a box entitled "Signature—Agent" by a person other than petitioner. The order was also mailed to Frederick E.

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[3] Section 1486(a) provides, in pertinent part, that an order of the NTSB

> shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

[4] Documents reflecting the service of the NTSB's order were not part of the record before the court of appeals. We have lodged copies of those documents—and other exhibits cited in this brief—with the Clerk.

Zimring, the attorney who had initiated the appeal of the suspension on petitioner's behalf; the Board received a return receipt executed, on November 27, 1989, in the box entitled "Signature—Agent." Exh. B.

Because the order was mailed to Mr. Zimring, it was not immediately served upon Kevin W. Daisey, a non-lawyer who, in March 1988, had replaced Mr. Zimring as petitioner's designated representative in the NTSB proceeding. See Pet. App. 30. On December 13, 1989, the NTSB's Office of General Counsel received a phone call from Mr. Daisey. Mr. Daisey advised that he had not received a copy of the order in petitioner's case. The NTSB mailed Mr. Daisey a copy of the order by regular mail that day. Exh. C; see Pet. App. 27-29.

2. On January 24, 1990, the sixty-first day after November 24, 1989, the court of appeals received petitioner's *pro se* petition for review. Although the petition was dated January 19, 1990 (Pet. App. 26), it was transmitted to the court by mail and was not received for filing until January 24. Exh. D. Under Fed. R. App. P. 25(a), filings by mail of papers other than briefs and appendices are not timely "unless the papers are received by the clerk within the time fixed for filing." Thus, if the 60-day period for a timely petition for review began to run on November 24, 1989, the date shown on the face of the order, the petition was one day out of time. Petitioner's petition for review indicated that the period for filing had commenced on that date; the petition sought review of "the final Order of the National Transportation Safety Board * * * *entered by the Board on Novem-*

ber 24, 1989 in accordance with the Board's Rules." Pet. App. 26 (emphasis added).[5]

Counsel for the government, unaware of the defect in the service of the NTSB order, moved to dismiss the petition as untimely. Exh. G. In his opposition, petitioner again advised the court that "[o]n November 24, 1989 the National Transportation Safety Board entered its Order * * *." Exh. H, at 5. Petitioner argued, however, that "reasonable grounds" existed for his failure to file his petition within 60 days of that date. He contended that the late filing was attributable to unusual delay in the Postal Service's handling of the petition. *Id.* at 6-8. He also noted that Daisey had not been served with a copy of the order before contacting the NTSB in December of 1989. *Id.* at 6.

3. The court of appeals granted the motion to dismiss the appeal, finding that petitioner had failed to demonstrate that reasonable grounds existed for an extension of the 60-day period for filing a petition for review as of right. Pet. App. 15. Petitioner filed a "motion for reconsideration." For the first time, petitioner argued in this motion that the period for the filing of a petition for review did not commence on November 24, 1989, because the order had not been

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[5] Until he filed his "motion for reconsideration" in the court of appeals, all of petitioner's filings in the court of appeals stated that November 24, 1989, was the date of the NTSB order's entry. In his docketing statement, petitioner gave "11/24/89" as the "[d]ate of entry of judgment or order"; he represented, incorrectly, that his petition had been filed on "1/19/90"; and he stated, also incorrectly, that the "[l]ast day for filing appeal or petition" was "1/24/90". Exh. E. Petitioner's brief, dated April 18, 1990, stated, "The final Order of the Board in this case was entered on November 24, 1990." Exh. F.

served on Mr. Daisey on that date. Exh. I. The court of appeals denied the motion without calling for a response from the government. Pet. App. 16.

ARGUMENT

In our view, the NTSB's rules provide that an order is not entered until it is served and that, when a party has designated a representative in an NTSB proceeding, service upon the party must be made upon that representative. Under that interpretation, the order at issue here was not served—and thus was not "entered"—until December 13, 1989. The petition for review was filed in the court of appeals within 60 days of that date. Although the record makes clear that petitioner had actual notice of the order in advance of the time he filed his one-page petition for review and placed no significance upon the date on which his representative was served until after his appeal had been dismissed, we do not oppose a grant of the petition, vacation of the court of appeals' judgment, and a remand for further proceedings.

1. As noted, the 60-day period for the filing of a petition for review as of right commences with "the entry of" an NTSB order. Under the Board's rules, "[t]he date of entry of the Board Order is the date on which the order is served." 49 C.F.R. 821.64. Under 49 C.F.R. 821.8(a), the Board is obligated to serve an order "upon all parties to the proceeding by certified mail."

Two provisions speak to the manner in which service is to be made on a party that has designated a representative in the NTSB proceeding. Under 49 C.F.R. 821.8(d), entitled "[w]ho may be served",

"[s]ervice upon a party or person may be made upon a person designated in accordance with § 821.7(f) to receive service"; if no representative has been designated, "service may be made upon the party himself, if he is an individual * * *." The next section of the regulations, 49 C.F.R. 821.8(e), entitled "[w]here service may be made," provides that "[s]ervice by regular or certified mail shall be made at the address of the person designated in accordance with § 821.7(f) to receive service, or, if no such person is designated, at the usual residence or principal place of business of the party * * *." Although the first of these subsections uses the permissive "may," the two subsections read together plainly require service on a party's representative when a representative has been designated.[6] In addition, Section 821.8 (g) indicates that a "presumption of lawful service" upon a party who has designated a representative arises only from receipt of the document at the representative's residence or place of business or from a mailing of a "properly addressed envelope"; a presumption of "lawful service" arises from acknowledgement of receipt at the party's residence or prin-

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[6] The Federal Aviation Act, 49 U.S.C. 1485(c), does not require service of an order upon a representative when one has been designated. Section 1485(c) provides:

> Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made.

With respect to orders issued in suspension proceedings, however, the pertinent regulations obligate the Board to employ one of the options made available by this statute.

cipal place of business only "[w]here there is no designee." [7]

The notice of Daisey's appointment as petitioner's representative stated that "[a]ll service and documents in this case should be served upon [Daisey]." Pet. App. 31. The NTSB's records reflect that service was not made upon Daisey before December 13, 1989. Accordingly, notwithstanding the date shown on the order, the NTSB order was not "entered"—as that term is defined in the Board's rules—until that date.[8] The petition for review was therefore timely when it was filed on January 24, 1990.

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[7] Section 821.8(g) provides:

> (g) *Presumption of service.* There shall be a presumption of lawful service in the following instances:
>
> (1) Where acknowledgment of receipt is made by a person who customarily receives mail or receives it in the ordinary course of business at either the residence or principal place of business of a person designated in accordance with § 821.7(f) to receive service; or
>
> (2) Where there is no designee, acknowledgment of receipt at the residence or principal place of business of the party himself, by a person who customarily receives mail or receives it in the ordinary course of business; or
>
> (3) Where a properly addressed envelope, indicating that it had been sent by regular, registered, or certified mail, has been returned marked "undelivered," "unclaimed," or "refused."

Another subsection, 49 C.F.R. 821.8(h), entitled "[d]ate of service," makes clear that the date of mailing (as opposed to receipt) is the date of service. This section does not, however, speak to the question of when service occurs if an order is not sent to the proper person.

[8] We do not suggest that any defect in service would postpone the commencement of the period prescribed by Section 1486(a); there is a difference between service that has occurred but has been defective in some respect and service that has not occurred at all. (It could not be argued, we be-

To be sure, when the court of appeals granted the motion to dismiss, it had nothing before it establishing that the order had been entered on a date other than the one shown, November 24, 1989. Moreover, petitioner repeatedly advised the court of appeals that the date shown was correct, and the record makes clear that petitioner operated on the assumption that this was the date on which the order had been entered. Nevertheless, we do not oppose the granting of the petition, vacation of the court of appeals' judgment dismissing the petition for review as untimely, and a remand for further proceedings. Petitioner was proceeding *pro se*; the government was the party that moved for dismissal in the court of appeals; and, although the government acted in good faith in doing so in light of the terms of the NTSB order and the representations in the petition for review, the documents reflecting the precise manner of service were not within petitioner's possession, but were available to the government.

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lieve, that sending an order by regular rather than certified mail would postpone the running of the 60-day period—although it might, under appropriate circumstances, give rise to "reasonable cause" for an extension of the period.) In this case, however, the Board's records reflect that petitioner's representative—the person the regulation requires to be served—was not served at all until December 13.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment of the court of appeals dismissing the appeal as untimely should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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